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>> From Phoenix Health Systems...HIPAA Knowledge...HIPAA Solutions <<  
> Healthcare IT Consulting & Outsourcing <

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## 1 / F R O M T H E E D I T O R S :

Like many of you, we've spent much of the last month focused on DHHS' "holiday gift" -- the Final HIPAA Privacy Rule. This issue concentrates on Privacy, starting with reports from Phoenix Health Systems' HIPAA Solutions Team members Chris Wierz and Helene Guilfooy. First, Chris offers a great in-depth reference tool that identifies, point by point, the differences between the final rule and the proposed rule. Then, Helene takes us on the road beyond the rule, with a "map" for taking the first, necessary steps to Privacy compliance.

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It's HIPAA Survey time again... Our quarterly industry surveys, through your participation, have become valuable measures of how we are progressing as an industry when it comes to HIPAA compliance. In the Fall Survey, we found that many payers expected to miss the Transactions compliance deadline. Providers' knowledge of HIPAA had grown substantially, but HIPAA budgets were few. How much further have we come? Have timelines been revised? Budgets set? Where do you stand in relation to your counterparts?

Participate in the Winter 2001 HIPAA Survey and find out! It's quick and easy -- and all online. Go to:  
<http://www.hipaadvisory.com/action/survey/>

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Thanks to everyone who took the time last month to comment on how HIPAAAlert can be improved. Most of you felt that HIPAAAlert's length and level of detail meets your needs. Thanks to your suggestions, you'll see coverage of new topics including industry initiatives and case studies, as the year progresses. Incidentally, if you think your

organization could be the subject useful for a useful case study, please write us about it. We could make you famous!

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## 2 / The HIPAA Alert Point-by-Point Privacy Guide: Final Privacy Rule vs. Proposed

by Chris Wierz, Vice President, Phoenix Health Systems

The final HIPAA rule for Standards for Privacy of Individually Identifiable Health Information was published on December 28, 2000 in the Federal Register. The majority of covered entities that are affected must comply by February 26, 2003

With this final publication come many questions, including:

- What is the purpose of this rule?
- Who does this rule affect?
- What are the changes from the proposed rule?
- What key specific disclosures are addressed?
- Is there any information that has been granted special protection?
- What key users are affected and how?

As a means of providing some of the answers to those questions, below is an analysis of the final rule, to assist your organization in beginning the task of meeting compliance.

### APPLICABILITY

The final rule applies to the following covered entities:

- Any health plan
- Any healthcare clearinghouse
- Any healthcare provider who transmits any health information in electronic form in connection with a standard transaction

### PURPOSE

There are three general purposes to the final rule:

- To protect and enhance the rights of consumers by providing them with access to their health information and controlling the inappropriate use of that information
- To improve the quality of healthcare in the US by restoring trust in the healthcare system among consumers, healthcare professionals, and the various organizations and individuals involved in the delivery of care
- To improve the efficiency and effectiveness of healthcare delivery by creating a national framework for health privacy protection that builds on efforts by states, health systems, and organizations and individuals

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### ANALYSIS OF DIFFERENCES: Final vs. Proposed Rule

Following is a point-by-point outline of Privacy Rule changes. With each topic, we:

1. summarize the original standard published in HIPAA, and
2. follow with an explanation of how the final Privacy rule addresses the standard, as compared to the proposed rule.

### GENERAL RULE

Standard:

Protected health information may not be used or disclosed unless

the disclosure is either authorized by the patient or is specifically permitted under the HIPAA regulation

Change:  
Definition of protected health information has expanded to include all individually identifiable health information transmitted or maintained by a covered entity, regardless of form

## CONSENTS

Standard:  
Covered entities must obtain the individual's consent prior to using or disclosing protected health information to carry out treatment, payment, or healthcare operations

Change:  
Major change from proposed rule which would have allowed this information to be used or disclosed without a consent

## AUTHORIZATIONS

Standard:  
Covered entities must obtain an authorization to use or disclose protected health information for purposes other than treatment, payment, and healthcare operations

Change:  
Authorization requirement similar to that in the NPRM (Notice of Proposed Rule Making) though now the process includes both consents and authorizations

## NOTICES

Standard:  
Covered entities must provide a notice of privacy practice to the individual, containing the individual's rights and the covered entity's legal duties with respect to protected health information

Change:  
Retained the general right of individuals to receive notices, along with imposing stricter requirements on revisions and modifications of notices

## MINIMUM NECESSARY

Standard:  
Covered entities must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose

Change:  
Standard does not apply to treatment, and rule significantly modified requirement for implementation

## DE-IDENTIFICATION

Standard:  
Regulation does not apply to health information that has been de-identified

Change:  
Reformulates the way that covered entities could demonstrate having met the Standard:

1. Applying statistical principles
2. Applying a safe harbor method

## TRAINING

Standard:  
Covered entities must train its workforce on the policies and procedures with respect to protected health information

Change:  
Removed the requirement for employees to sign certifications and the triennial re-certification procedures, though the responsibility for implementing policies and procedures and for documenting training still remains

## PRIVACY OFFICER

Standard:  
Covered entities must designate a privacy official who is responsible for the development and implementation of the policies and procedures of the entity

Change:  
Retained the requirements for a privacy official as specified in the NPRM

#### SPECIFIC DISCLOSURES: PUBLIC NEED

Standard:  
Covered entities may use or disclose protected health information without authorization for purposes including public health activities, research, and fraud investigations

Change:  
Retained the rule for disclosure for national priorities, with clarifications

#### SPECIFIC DISCLOSURES: FACILITY DIRECTORIES

Standard:  
Covered entities may use specific protected health information to maintain a directory of individuals in its facility

Change:  
Authorization requirement changed from an "opt-in" approach to an "opt-out" approach

#### SPECIFIC DISCLOSURES: MARKETING

Standard:  
Covered entities may disclose protected health information for marketing purposes as defined in the rule

Change:  
Definition clarifying which activities are no longer considered marketing and therefore will not require an authorization

#### SPECIFIC DISCLOSURES: FUND-RAISING

Standard:  
Covered entities may use or disclose demographic information and dates of healthcare service provided, to an individual or institutionally related foundation for purposes of raising funds for its own benefits

Change:  
Narrowed the circumstances under which covered entities must obtain authorization

#### SPECIAL PROTECTION: PSYCHOTHERAPY NOTES

Standard:  
Covered entities must obtain the individual's authorization to use or disclose psychotherapy notes to carry out treatment, payment, or healthcare operations

Change:  
Clarification of provisions with stricter requirements maintained as in the NPRM

#### KEY USERS: BUSINESS ASSOCIATES

Standard:  
Persons who perform functions or activities involving the disclosure of protected health information, on behalf of or for covered entities

Change:  
Elimination of the third-party beneficiary requirement

#### KEY USERS: PROVIDERS

Standard:  
Allows for disclosure of the full medical record to providers for purposes of treatment

Change:  
Loosens the minimum necessary disclosure requirement for providers for purposes of treatment

#### KEY USERS: GROUP HEALTH PLAN

Standard:  
Group health plan must ensure that the plan document restrict uses and disclosure of protected health information by the plan sponsor

Change:  
Stricter compliance for companies that sponsor health plans, will

not be able to access the personal health information  
employment-related purposes

#### POLICIES AND PROCEDURES

##### Standard:

Covered entities must implement policies and procedures with  
respect to protected health information

##### Change:

Clarification that policies and procedures be reasonably designed  
to take into account size of organization and nature of the  
activities

#### RIGHTS OF INDIVIDUALS: NOTICES

##### Standard:

Individuals have the right to adequate notice of uses and  
disclosures of protected health information

##### Change:

Maintains the rights of individuals, with modifications to  
content and distribution requirements

#### RIGHTS OF INDIVIDUALS: ACCESS

##### Standard:

Individuals have the right of access to inspect and obtain a copy  
of protected health information

##### Change:

Maintains rights of individuals, with modifications to exceptions  
and time frames of responses

#### RIGHTS OF INDIVIDUALS: AMENDMENTS

##### Standard:

Individuals have the right to have a covered entity amend  
protected health information

##### Change:

Maintains the right of individuals, with modifications on specific  
actions required by covered entities

#### RIGHTS OF INDIVIDUALS: ACCOUNTING OF DISCLOSURES

##### Standard:

Individuals have the right to receive an accounting of disclosures

##### Change:

Maintains the right of individuals, with modifications to  
exceptions and time frame

#### RIGHTS OF INDIVIDUALS: RIGHT TO RESTRICTIONS

##### Standard:

Individuals have the right to request that uses and disclosures of  
protected health information be restricted

##### Change:

Maintains the right of individuals, with extension to health plans  
and clearinghouses

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### 3 / Stepping Out on the Road to Privacy Compliance

by Helene Guilfooy, Principal, Phoenix Health Systems, Inc.

Remember the old saw about "be careful what you wish for"....We all  
wished that the Privacy Final Rule would be published and now we have  
it. What are we going to do with it? How will we meet the  
February 2003 compliance date? Here are first, essential steps  
we recommend, within the provider environment:

Before setting out, you must know where you are, what your  
organization's strong points are and where you may be vulnerable.  
So, your first step will be conducting a comprehensive impact analysis.  
To ensure you get the information you need, include the  
following:

- Read and understand the Privacy Rule's sections on use and  
disclosure of protected health information.

- Make a list of all of your business associates. Determine whether you give protected health information to them. If so, document the specific information and the business purpose that is accomplished in the exchange. This step will determine whether a Business Associate agreement is necessary and provide a necessary record that you have evaluated each associate's involvement in your organization's information flow. This process will prevent you from having to obtain an agreement from all of your business associates and, more importantly, not obtaining one from those that you should.
- Document each point at which a patient consent or authorization for release of information is obtained in your organization. You may be surprised at the varied places and ways that these releases are obtained! Take a tour of your organization to make sure you've covered every possibility. Don't forget to look INSIDE the hospital. There are many occasions when release of information is requested following a patient's admission.
- Look at how the release is requested and obtained. Can the patient review the release privately and ask questions of a knowledgeable staff member? If the patient is unconscious, what happens when she regains consciousness? Do your satellite facilities obtain releases? What instructions are the staff given? Are permissions obtained at the referring provider site and then sent in with the patient when they present for admission?
- Gather copies of all releases or consents from each area. Are they in compliance? Sometimes only simple changes are required.

Remember, authorizations to release information must reflect all of the information to be released and state why it will be released.

- Do you currently allow patients to review their health information? Can they request amendments to this information? 36 states allow patients to review medical records maintained by a hospital, 33 allow review of records maintained by a practitioner and 15 allow review if the information is held by a pharmacy. Even if your state is among those that allow the review, your policies and processes may need to be changed to comply with the final Privacy Rule.

Other actions needed before you begin to implement the Privacy Rule are reviewing your software capabilities and working with your vendors to determine the best method for you to achieve compliance.

Consider these issues:

- The patient has the right to know who their information is given to. This tracking is already performed in the paper world, but may prove to be a challenge in the electronic one. You must work with your vendors to provide a method -- an electronic "in/out card," if you will -- that allows you to report these disclosures.

This shouldn't be confused with the ability to capture information every time a record is used or reviewed. The latter is known as 'read audit;' expect to read more about it in the final Security Rule.

- To qualify protected health information as "de-identified" information, several specific data elements must be removed. Work with your vendors to determine mechanisms to satisfy this requirement.

Alternatively, look for a business associate that can remove these data elements from records that need to be transferred without identifying the patient.

- The privacy rule encourages the use of an alternate confidential address if the patient requests it, allowing him to request that certain information be sent to an address that is not the primary address. Since hospital information systems usually don't have this capability, you should work with your vendors to provide it.

These "directions" are just the beginning, but they will get you out of the parking lot and onto on the road of compliance with the final Privacy Rule. Future articles in HIPAAAlert will help you merge into the fast lane!

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#### 4 / H I P A A n e w s

##### \*\*\* DHHS Issues Two Corrections to Privacy Final Rule \*\*\*

The Department of Health and Human Services (DHHS) issued two corrections to the Privacy Final Rule on December 28, 2000. The first change provides further explanation and justification for the clergy exemption under the section addressing Use and Disclosure for Facility Directories.

The second change provides some further clarification under the section addressing Effective Date and Compliance Date. Specifically, the correction states that no covered entity is expected to comply with the regulation until February 26, 2003 (2004 for small health plans). DHHS will not enforce the regulation prior to that date. Voluntary implementation before those dates is permitted.

For the full text of the changes, go to:

<http://www.hipaadvisory.com/regs/finalprivacy/corrections.htm>

##### \*\*\* Providers and Payers Criticize, While Patient Groups Praise \*\*\*

Following the release of the HIPAA Final Standards for Privacy, industry groups and patient and privacy advocates issued statements about the possible impact to the nation's health care.

Provider organizations, like the American Medical Association and the American Health Association, have raised concerns about the costs as well as details such as access by law enforcement. The American Association of Health Plans, representing 1,000+ payer groups, stated that the rule was a "call for more health care lawsuits," and that it would reduce, not improve, consumers' access to quality health care.

The New York Times reported that President-elect George W. Bush would be asked by industry groups to revise the privacy rule. Ari Fleischer, a spokesman for the Bush transition team, was quoted as saying, "As with all last-minute regulations, we will review them upon assuming the presidency on Jan. 20."

The American Civil Liberties Union announced, "we will vigorously oppose any effort by Congress or the incoming Bush administration to weaken or block these important new privacy protections."

According to the California HealthCare Foundation, "At a time when consumers are demanding online access to their physicians and to their medical information, the new privacy law will help drive necessary changes in how this information is protected." The California HealthCare Foundation is a nonprofit philanthropy whose mission is to expand access to health care.

Compliance with the Final Privacy Rule is required February, 2003.

Full text of the press releases and statements:

Provider views: <http://www.hipaadvisory.com/views/provider/>

Patient views: <http://www.hipaadvisory.com/views/patient/>  
Payer views: <http://www.hipaadvisory.com/views/payer/>

\*\*\* Insurer E-mails Patient Data to Wrong Doctors \*\*\*

Patient confidentiality was violated when a California insurer accidentally e-mailed the names of 12,000 patients to the wrong doctors, according to an Associated Press report. The mistake was blamed on a "computer glitch."

Health Net, California's third largest health insurer, sent the list of patients being treated for depression and anxiety to nearly 5,000 doctors. After the error was discovered, the doctors were asked to destroy the list and notify Health Net that they had done so.

A Health Net spokesman said that future mailings will be "reviewed more vigorously to ensure that the correct information goes out," according to the San Francisco Chronicle.

For more HIPAA-related news, go to:  
<http://www.hipaadvisory.com/news/>

\*\*\* New Congress to Push Privacy \*\*\*

Legislators expressed confidence that web site privacy legislation will be passed this session, according to Wired magazine. The Consumer Electronics Show panel of senators and representatives discussed plans to rapidly introduce legislation that will govern the requirements of web sites to protect personal information.

Senator Bill Frist (R-TN), a former practicing cardiologist, said that health care has the worst record of any industry in embracing information technology. He said doctors don't trust making patients records available online because it may violate their Hippocratic Oath.

Senators Conrad Burns (R-MT) joined Sen. Frist on the panel with Representatives Joe Barton (R-TX) and Bobby Rush (D-IL).

For more HIPAA-related news, go to:  
<http://www.hipaadvisory.com/news/>

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5 / H I P A A d v i s o r : Legal Q/A with Steve Fox, J.D.

\*\*\* Consents and Authorizations Explored \*\*\*

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QUESTION: Under the final privacy rule, what, if anything, is the difference between an individual's "consent" to the use of personally identifiable health information as opposed to "authorization" for such use?

ANSWER: Basically, individuals typically "consent" to the use of their personally identifiable health information ("protected information") in the normal course of business. In contrast, the final rule requires covered entities to obtain "authorization" in order to use protected information in a manner or for a purpose that is generally not necessary for treatment, payment, or the other health operations of a covered entity.

Under the proposed rule, covered entities were only obligated to obtain certain permissions for the use of protected information if such use was not necessary to carry out an individual's treatment, payment, and/or the other health care operations of the covered entity. In contrast, the final rule requires that individuals assent to generally



all uses and/or disclosures of their protected information. The rule defines two different types of uses and/or disclosures and mandates required permissions for each of the two types. Specifically, the final rule requires covered entities to obtain an individual's written "authorization" for uses and/or disclosures of protected information not permitted or required under the rule. However, an individual's "consent" is generally required for the use and/or disclosure of protected information in situations related to the individual's treatment, payment and/or the other health care operations of the requesting covered entity.

"Consents" are written in general terms and inform individuals of where they can obtain further information about the privacy practices of the covered entity requesting the consent. Of the three different types of covered entities, primarily health care providers will be required to obtain consents. Under the final rule, health care providers are allowed to condition the provision of treatment upon the receipt of an individual's consent to the provider's use and/or disclosure of protected information to carry out treatment, payment and/or its other health care operations. Providers may refuse to treat individuals who do not consent to uses and/or disclosures solely for those purposes.

An "authorization" allows requesting entities to use and disclose protected information for ancillary purposes, such as marketing, pre-enrollment underwriting or employment determinations. Authorizations must be written in specific terms and may even allow use and disclosure of protected information by third-parties. Covered entities are generally not permitted to refuse to treat or condition eligibility for benefits or enrollment in a health plan based upon the fact that an individual refused to sign an authorization. This prohibition is intended to prevent covered entities from coercing individuals into signing an authorization for a use or disclosure that is not actually necessary to enable the covered entity to perform its primary functions.

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Steve Fox, J.D. has joined the Washington, D.C. office of Pepper Hamilton LLP, where he is a partner. This article was co-authored by Rachel H. Wilson, an associate at Pepper Hamilton. Pepper Hamilton LLP is a multi-practice law firm with more than 400 lawyers in ten offices.  
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